IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

ORIGINAL, NO. 19

IN EQUITY

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF WISCONSIN,

Defendant.

REPLY BRIEF OF DEFENDANT STATE OF WISCONSIN

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In answer to the reply brief of the plaintiff, we wish to direct the Court's attention at the outset to the statements made by counsel at the time permission was asked to file their reply brief. Counsel stated as one of their principal reasons for filing a reply brief the desire on their part to furnish the Court with references to parts of the record which supported their claims made in their original brief. Although this was the reason urged, no effort has been made to have the original brief comply with the rules of the Court in this respect, nor to furnish references for the numerous unsupported claims of

the principal brief submitted in this cause by the plaintiff. At pages 343–387 of our brief counsel had their attention called to specific misstatements in their brief as well as to unsupported assertions made by them in their brief. No effort has been made to sustain or explain the statements complained of, and for this reason we assume that counsel admit the charges made in that part of our original brief. They do state on pages 20–21 of their reply brief that they intend to answer our charges. In their effort to do this they state that the name Pinewood Lakes by which the lakes at the sources of the various tributaries of the Montreal River were known about the time of the delineation of the boundary was not ascribed to these lakes until after Cram had "called the lakes by that name." The quoted statement is startling because we are unable to find that Cram ever called this group of lakes the Pinewood Lakes. The fact is that he did not so state, and counsel made no effort to refer to any part of the record to support the claim made. Thus, it would seem that counsel seek to justify an improper conclusion from the evidence by making a statement entirely unsupported by the evidence. We call the attention of the Court to this fact because throughout the entire reply brief, statement after statement is made just as it was made in the original brief without referring to any part of the record for support. In most instances the statements are absolutely unsupported by anything in the record. In other instances the statements are directly opposed to all of the evidence in the record. We will not point to all of those instances because it would make the brief entirely too long. We refer to it generally, however, in order that the Court may know that we are not accepting or adopting the unsupported statements made by counsel in either their original brief or their reply brief.

In our original brief we also accused counsel of misquoting the evidence of the witness Betts. (Wisconsin brief, page 374.) Their reply is that:

> "We said and still *believe* that Captain Betts testified to coming from Chicago by schooner through the Door passage in 1845 and that the old Pilot Island light was then burning." (Reply brief, page 21.)

They cite no authority in the record for this assertion except perhaps their "belief". In order to settle this controversy, we call the Court's attention to the record. Captain Betts testified as follows:

> "Q Were you ever on the waters of Green Bay before 1858?
> A Yes, I come through Death's Door in 1855 on a lumber vessel." (R. p. 27.)

On cross-examination he was asked:

> "Q Now, you spoke about the light on Plum Island; that was burning, did you say, when you first came through Death's Door?
> A Yes.
> Q And that light was located at the point where the ruins are now located; is that right?
> A Yes.
> Q In other words, the ruins that are there on that island now are the ruins of the light that you saw when you first came through Death's Door?
> A Yes, that is it exactly." (R. p. 39.)

Thus it will be observed that counsels' belief is directly opposed to the actual facts in the record. This, of course, also destroys their effort to claim that the Plum Island light was erected before 1850. (See our brief, pp. 180–185.)

They have made no effort whatsoever to explain any of the other misstatements and unsupported claims made in their original brief or to answer our charges in that respect.

Montreal River Section

Counsel also state on page 6 of the reply brief:

> "Another copy, (referring to Plaintiff's Exhibit 7) with the line indicating the boundary, was found among

> the personal effects of Lucius Lyon, in a bundle of newspapers bearing dates 1834 to 1836."

This is a misstatement of the facts in the record again, for on page 37 of the original stipulation accompanying the exhibits in this case, counsel for the plaintiff and the defendant stipulated:

> "Mr. Sherwood noticed a bundle of old newspapers which later were found to date from about 1834 to 1860, (not 1836) which Mr. Thayer told him had belonged to Lucius Lyon. Mr. Thayer then gave the bundle of newspapers to Mr. Sherwood, who has ever since had possession thereof. That quite recently said bundle of papers were opened in Mr. Sherwood's presence and the map, Plaintiff's Exhibit 6, was found among them, and had come with them when Mr. Sherwood got them from Mr. Thayer. Said map is furnished by said Sherwood to plaintiff's counsel."

The same assertion was made in the oral argument. We feel that it is entirely inexcusable because counsel must be held to have known the exact terms of their stipulation. If they did not know, it but illustrates again their entire recklessness in making claims and assertions in their argument and in their brief without regard to what the record actually shows. Counsel were of course anxious to claim the dates 1834–1836, because without those dates it became apparent to them that the rather extended argument on pages 9–11 of their principal brief falls entirely flat. In other words, because they have failed to show that Lucius Lyon had the map, Plaintiff's Exhibit 6, in his possession in 1836, they failed to connect the map in question with any action taken by Lucius Lyon. We think this failure is more clearly demonstrated by reason of the fact that when Lyon again refers to the boundary in 1839 and 1840, (See Wisconsin brief, pages 57–58) he does not refer to the Burr map, Plaintiff's Exhibit 6, or a similar map, but refers to a Farmer map. This fact and the fact that Plaintiff's Exhibit 49 shows that as early as January 5, 1834, Lucius

Lyon was furnished with a Farmer map, demonstrate quite clearly that not only have counsel failed to show that Lyon's information came from the Burr map, but it has been quite successfully demonstrated that his information came from the Farmer map to which he referred in his letter. (Wisconsin Exhibit 22.)

Islands in Menominee River

Counsel have called our attention on page 10 of their brief to a matter that we had overlooked in our original brief in connection with our argument on pages 99 to 109 of that brief, that is, that Congressman McClelland, who proposed to Congress the adjustment of the boundary line when the Wisconsin Enabling Act was passed, (see our brief, pages 80–82) was chairman of the committee of the Michigan constitutional convention that proposed the boundary provision of the Michigan constitution of 1850. In failing to call the Court's attention to that in our original brief, we feel we overlooked a point which clinches our argument that Michigan, by the adoption of the constitution of 1850, adopted the adjustments contained in the Wisconsin Enabling Act of 1846. When it is considered that the identical language which supplied the gap in the Michigan boundary between the headwaters of the Montreal River and Lac Vieux Desert was incorporated in the Michigan constitution by the efforts of the very man who was responsible for inserting it in the Wisconsin Enabling Act and who engineered the entire adjustment of boundaries as found in the Wisconsin Enabling Act, can there be any doubt as to what the understanding, purpose and intention of Michigan was when she adopted the language of the Wisconsin Enabling Act in her constitution of 1850? McClelland had proposed the filling in of the gap. He had proposed the division of the islands. He had proposed the reservation as to ratification by Michigan. At the constitutional convention of 1850 he procured the incorporation in the Michigan constitution of the

language which filled the gap. He was instrumental finally in obtaining official approval from his State. We think it is fair to say that he intended by that action to ratify and confirm the settlement and adjustment for which he labored when in Congress. For these reasons we say that not only must it be held that by the adoption of the constitution of 1850 Michigan accepted the boundary line between the Montreal River and Lac Vieux Desert, but she also accepted the division of the river islands, because both these propositions were united and were the adjustment contemplated by the Wisconsin Enabling Act of 1846.

Counsel claim in their brief that:

> "To hold the constitution of 1850 as a ratification would be to determine in effect that plaintiff must surrender to the defendant Merryman Island, Sawyer Island and Sugar Island, although not claimed by Wisconsin in its answer." (Reply brief, page 10.)

We have again examined our answer and while we have never claimed Merryman Island, there is nothing in our answer to indicate that we have waived any claim as to Sugar Island or Sawyer Island, and counsel have again misstated the situation in making that assertion as to Merryman Island.

The State of Wisconsin has always recognized the action taken by the Federal Government and the conclusion arrived at by the government officials that Merryman Island was not in fact an island, as it appears in a letter from J. M. Edmunds, Commissioner of the General Land Office, to Thomas J. Townsend, Surveyor General at Dubuque, Iowa, dated June 5, 1862, attached to Sheet 28, Wisconsin Exhibit 198, which reads as follows:

> "In regard, however, to the large island situated as above and the two smaller ones in Section 17, numbered as Lots 1 and 2, the provision of the law above mentioned does not apply for the reason that they are not in the Menominee River, but clearly east of it, the only color for supposing them within its limits being a small creek put-

> ting out from the river eastwardly into the Michigan township so as to form the said islands. There can consequently be no good reason for doubts upon this point, and hence you are directed to treat them as lying in the State of Michigan."

Sawyer and Sugar Islands, however, are claimed by Wisconsin because Sawyer Island was surveyed as being a part of Wisconsin in 1854, and Sugar Island, so far as we have been able to find from the records, has never been claimed by Michigan.

Wisconsin claims and has always claimed that because her boundary provides that:

> "The line be so run as to include within the jurisdiction of Michigan all the islands in the Brule and Menominee rivers (to the extent in which said rivers are adopted as a boundary) down to and inclusive of Quinnesec Falls of the Menominee, and from thence the line should be so run as to include within the jurisdiction of Wisconsin all the islands in the Menominee river, from the falls aforesaid down to the junction of said rivers with Green Bay;"

the boundary should run along the main channel of the Menominee River from its mouth until it approaches the various islands in the river at points where islands are located, regardless of where the main channel may be. The boundary should be run so as to follow the channel between the respective islands and the mainland of Michigan up to Quinnesec Falls. From that point on it should follow the main channel of the Menominee River, except when any islands are encountered. Wherever islands are encountered, regardless of where the main channel may be, the line should be run so as to follow the channel between the Wisconsin mainland and the islands in question. In that manner the intention of Congress will be carried out. The boundary will then be run as it has been accepted ever since 1850, and it can be run with the least expense, trouble and inconvenience

to all parties concerned, and without any injustice to any of the parties.

Counsel also say "three [islands] (the principal ones) are surveyed in Michigan." (Reply brief, page 11.) Counsel have failed to specify what three islands they refer to, but we assume again in view of what was said on pages 10 and 11 of their reply brief that they refer to the three islands above mentioned. We have stated our position as to Merryman Island. As to Sawyer Island, counsel admit on page 10 of their reply brief that this island was surveyed in Wisconsin, but claim that taxation was abandoned by Wisconsin. We are unable to find any such evidence in the record. We find, however, that the Special Counsel for Michigan testified (R. p. 390) that this island was surveyed in Wisconsin, and an examination of Wisconsin Exhibit 336, reproduced at pages 295 and 297 of our main brief, shows it was sold for taxes as early as 1836.

As to Sugar Island, they claim that "sheet 36, defendant's Exhibit 197 shows the survey of Sugar Island in Michigan." We have again carefully examined this sheet. It shows the outlines of nine islands, none of which, however, were surveyed so far as the plat shows. No meander lines or posts are indicated or referred to on this plat. An examination of sheets 29, 30 and 31, Wisconsin Exhibit 198, shows the extensive meander post and meander line references that were incorporated in a plat when an island was surveyed. It is also to be noted that when an island was surveyed, it was assigned a lot number. None of this was done as to any of the islands shown on Sheet 36, Exhibit 197, from which, of course, it is quite apparent that counsel have again grievously erred in making the above assertion, and their claim that three of the principal islands are surveyed in Michigan is entirely unsupported by the record. The fact is that counsel have been unable to find anywhere in the record any evidence that a single island recognized by the Federal

Government as an island below Quinnesec Falls has ever been surveyed in Michigan, and the argument made on pages 10 and 11 of plaintiff's reply brief is an effort on the part of the plaintiff to supply by argument and unsupported statements, circumstances and support for Michigan's claims which counsel were unable to supply by witnesses or documentary proof.

The situation as it appears in the record is that Merryman Island, because the Federal Government concluded that it was not in fact an island, has been surrendered to Michigan by Wisconsin. As to the remaining islands, the record shows and our original brief demonstrates (pages 288 to 307) that all the valuable islands between the mouth of the Menominee River and Quinnesec Falls have been surveyed as being in Wisconsin, and taxed by Wisconsin or else owned by the government; that Wisconsin has successfully prevented Michigan from exercising authority over the islands in the Menominee River; that the complaint in this case admits that Wisconsin has possession of the islands in the Menominee River. While there are still some islands which are unsurveyed, these islands, as appears from Plaintiff's Exhibit 172 and Wisconsin Exhibits 197 and 198, are all very small and of little value. In some instances the expense of determining on which side of these islands the main channel of the Menominee River flows would be greater than the value of the islands involved. It was this thought that undoubtedly influenced Congress in making the division of the islands in 1846. It was this realization that undoubtedly persuaded Michigan to submit to the division of the islands, and because of this fact the boundary line should now be approved as it has been accepted for the period since 1850. Regardless of what counsel may say or claim in their brief, the fact remains that Michigan has been unable to point to a single instance in the record in this case where it was shown that she made any effort to claim any of the islands

below Quinnesec Falls, with the exception of Merryman Island, which was conceded to her on the theory that it was no island at all, and with the exception of another island near Menominee, Michigan, but as to this island the authorities of Wisconsin successfully defied the authorities of Michigan. (See our brief, pages 302–303.) These are the only instances where Michigan has ever asserted any claim to these islands in this entire period, and as pointed out in our brief, there is no authority given by the legislature to claim these islands now, from which we conclude that Michigan is willing still to stand by the bargain made by her Congressman McClelland in 1846.

Green Bay Section

On pages 19, 20 and 24, as well as in the charts attached to counsels' brief, counsel attempt to demonstrate that the channel through Rock Island is very narrow and dangerous. They have made a rough draft showing the various islands and shoals in the vicinity of the Rock Island passage. They state that the red line drawn immediately to the right or southeasterly of Rock Island indicates "the bottom in a parallel cross-section in the entrance of this passage," that is, a cross-section parallel to the cross-section produced by our Figures 29 and 30, and the red line in Figure 29 of their map is to indicate the area shown by the red line on Figure 30. By referring to their sketch opposite page 24 of the brief, it will be noted that the red line thus referred to is to refer to Fisherman Shoal. Counsel again have been guilty of distorting the facts in their effort to show the situation at the Rock Island entrance. They have misplaced Rock Island by placing it almost due east of Washington Island, while they have taken Fisherman Shoal, which is south of Rock Island, and placed it northeasterly of Rock Island. A close examination of Figure 30 will show Fisherman Shoal southeast of Rock Island and far removed from the red line shown by counsel. Fish

Island, which is north of Fisherman Shoal, is a little southeast of the northern point of Rock Island. These facts will be demonstrated by an examination of Plaintiff's Exhibit 114, from which Figure 30 was made. The region along the red line is not shoal water as claimed by counsel, but water from six to twenty-one fathoms in depth. Counsel also state that they have assumed that all of the soundings shown in Plaintiff's Exhibit 114 are in feet. If they had referred to their own exhibit (Plaintiff's Exhibit 114) under the subject of notes, they would have found there stated that "water areas with a depth to twenty-one feet are tinted in blue. Depths within tinted areas are in feet; those in untinted areas are in fathoms." They have drawn their red line through an area shown on Plaintiff's Exhibit 114 to show depth in fathoms, and claim in their brief that it is an area of depths in feet. But even that would not sustain their charges made on Figure 29, and so they shifted the location of Fisherman Shoal and Fish Island northerly and across the mouth of Rock Island passage.

We also claim that they have improperly shifted the St. Martin Island shoals and Nine Foot Shoal south of St. Martin Island and south of the point where they are actually shown on the maps, by extending their green line in Figure 30 beyond point "D" as indicated on our Figure 29 Point "D" is St. Martin Shoal, and a close examination of Figure 30 will show that St. Martin Shoal is at that point. We say, therefore, that the effort of counsel to overcome the graphical demonstration that Rock Island passage is wider than Death's Door has failed because counsel have not presented the facts as they appear in Plaintiff's Exhibit 114, and because counsel have misrepresented the actual situation in that region.

Conclusion

In conclusion we submit again that the entire cause should be dismissed, and that defendant's motion, made before the answer in this case was filed, and decision upon which was reserved at the time of the argument of the motion, should be granted, and that in granting it the Court should impose the costs of this proceeding, including the costs of preparing briefs and the record in this case, entirely upon the plaintiff, first, because she has failed to make out any case whatsoever on the facts; second, because it has conclusively been shown that there was no foundation for the action when it was commenced; and third, because counsel have failed to abide by the rules of this Court in the presentation of their case in that they have not furnished the Court with the authorities upon which they base their various claims, and that, moreover, they have repeatedly misstated the facts in order to make it appear that the proof submitted by them was greater than that actually sustained by the record.

In requesting such a decision we feel that we are not asking for more than the facts justify, because the claims made by the plaintiff in this case have been so extended and have required the expenditure of such large sums of money in the preparation of briefs and presentation of our case, that it now being demonstrated that there was no foundation for the claims originally, we should not be required to pay this large expense made necessary by the broad, general assertions contained in the complaint. We make this claim especially because we feel that we gave to counsel for the plaintiff every opportunity to avoid such a contingency by calling the Court's attention and calling counsels' attention to our theory and our claims in our original motion to dismiss.

In arguing and presenting that motion, counsel argued propositions and questions of fraud as the basis of their claim which have not been advanced at the argument of this case

now, and which we are confident they knew at that time could not be supported. Under all the circumstances, whatever expense is placed upon the State of Michigan in the way of costs in this case will be the result of her own actions, and we feel will be justly placed where the responsibility belongs.

For these reasons we respectfully submit that the complaint in this case should be dismissed, and that provision should be made for the taxation of costs to include the expense of preparation of exhibits, the expense of the commissioner, the expense of printing the record and the expense of printing the briefs in this case, all of which is respectfully submitted.

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